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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| J & H COPY SERVICES, INC., | |
| Plaintiff and Appellant, | G036214 |
| v. | (Super. Ct. No. 01CC07067) |
| PINNICA CORPORATION et al., | O P I N I O N |
| Defendants and Respondents. | |

Appeal from a judgment of the Superior Court of Orange County, Derek G. Johnson, Judge. Reversed and remanded.

Jay M. Coggan & Associates, Jay M. Coggan and David N. Tarlow, for Plaintiff and Appellant.

Theodore C. Beall for Defendants and Respondents California On-Site Copying, Inc., etc., and Mark Holman.

A conspiracy to commit a tort is, by its nature, secretive; it would be unusual – and highly counterproductive – for the parties involved in such an arrangement to openly acknowledge their participation in the scheme. As a consequence, the existence of a conspiracy is typically established through inferences – conclusions drawn from surrounding facts and circumstances, including the relationships among the alleged members and between them and their target.

This is such a case. Everyone agrees that Daniel Johnson "hacked" into the internet website operated by plaintiff J & H Copy Services, Inc. (J & H), rendering it temporarily inoperative, and leaving a disparaging message to be read by anyone who attempted to access the website. The issue in dispute is whether he did so pursuant to a conspiracy formed with defendants EZ Copy, a competitor of J & H, and EZ Copy's President, Mark Holman. And while Johnson himself had no prior relationship with J & H, it is undisputed there was substantial "ill will" between J & H and both EZ Copy and Holman. There was also evidence that prior to the hacking incident, Holman had expressed a desire to harm J & H, and asked Johnson directly: "is there something that you can do to get into their website?" Finally, there was evidence that almost immediately after the hacking, another employee of EZ Copy contacted a mutual customer of both J & H and EZ Copy, to spread the word of J & H's security breach – before J & H itself was even aware of the problem.

Those facts, while not conclusive, were certainly sufficient to allow a jury to infer that Holman and EZ Copy had conspired with Johnson in the decision to hack into J & H's computer. Even the trial court acknowledged "the dots connect . . . it smells to high heaven." Nonetheless, the court granted summary judgment in favor of Holman and EZ Copy. That was error, and we reverse.

* * *

This case arises out of an incident of what is commonly referred to as computer hacking. Plaintiff J & H, which is engaged in the business of copying

confidential medical records, maintains an internet website used by its customers. Its website was hacked into and disrupted by Johnson, who was at that time an employee of defendant Pinnica Corporation. Specifically, Johnson was able to alter the website so that a person attempting to access it would find only a nearly-blank screen containing a short and somewhat profane rant stating, among other things, that it was "the easiest hack ever."

Pinnica, Johnson's employer, is engaged in the business of website design, and had been hired by defendant EZ Copy, prior to the hacking incident, to assist it with its own website. After the hacking occurred, it was traced back to Pinnica, and specifically to Johnson. There is no dispute regarding the fact that Johnson personally accomplished the hacking. In an e-mail, defendants EZ Copy and Holman characterize as a "confession," Johnson allegedly wrote to others at Pinnica: "I know what I did . . . . [¶] I don't need to hear what repercussions may or may not result from what I did. I did what I did because of my own personal feelings and not because of anything our client said. I don't need to hear what you may have to say. I have the repercussions from my personal life to deal with and the thought of the current investigations are enough. [E]ither you want to fire me or not . . . either way I accept your decision and am not going to argue it . . ."[1] Johnson subsequently committed suicide.

EZ Copy's principal, defendant Holman, had previously worked for J & H, and had been a close friend of J & H's principals. That relationship had broken down, however, and Holman acknowledged that at the time of the hacking incident, a significant degree of "ill will" existed between them.

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[1] J & H's objections to this purported e-mail "confession" were sustained. We mention it only as background information, not crucial to our analysis. In any event, we would not construe the document, even if properly authenticated, as an unequivocal denial of the alleged conspiracy. Taken at face value, the document reflects Johnson acted for "personal" reasons, and "not because of anything our client said." But we note it does not actually deny that the client "said" something.

J & H sued Pinnica, alleging it was liable for the misconduct of Johnson, its employee. J & H later amended its complaint to add EZ Copy and Holman as defendants, alleging they had conspired with Johnson to accomplish the hacking.

EZ Copy and Holman moved for summary judgment, and alternatively for summary adjudication of each cause of action, arguing that J & H lacked sufficient evidence to support its conspiracy allegation. In support of the motion, they asserted, correctly, that as defendants moving for summary judgment, they were not required to "conclusively negate" the conspiracy allegation, but only to show that one or more elements of the cause of action cannot be established. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Once they had done that, the burden shifted to J & H to show that a triable issue of fact existed as to the alleged deficiency in its case.

In their separate statement of undisputed facts supporting their motion, EZ Copy and Holman asserted, as both "fact 5" and "fact 10" that Johnson's alleged e-mail "confession" established that he did the hacking "completely on his own and that no clients requested that he tamper with J & H's website." They also asserted, as "facts" 6, 7, 11 and 12, that the testimony offered by J & H's principals was insufficient to establish the alleged conspiracy. Finally, they asserted, as "facts" 14 and 15, that Pinnica employee Joseph Stammen had testified that his only evidence of a conspiracy between Johnson and the moving defendants was a "gut feeling," and that Johnson had told him that he had hacked into the J & H website "on his own," to "see if he could do it."

J & H's opposition included evidence that: Johnson had begun performing some services independently for Holman, contrary to the wishes of his employer, Pinnacle; Holman had animosity toward J & H, his former employer, and its principals – among other things, he believed they had wrongfully reserved a web address which should have belonged to EZ Copy; Stammen overheard Holman saying to Johnson, prior to the hacking, "I wish there was some way I could fuck that company up, and can – is there something that you can do to get into their website?"; Early in the morning after the

hacking had been accomplished, EZ Copy's employee, Troy Peterson, was the first to call LabOne, a client of both J & H and EZ Copy, to inform it of the security breach in J & H's website; A LabOne representative immediately checked the site, and in turn, notified J & H; J & H itself was not even aware of the problem until contacted by LabOne.

The trial court concluded J & H's evidence was insufficient to create a triable issue of fact. The court explained, "Well, there's no question that . . . the dots connect. I don't have any problem with that. It smells. It smells to high heaven. . . . [¶] . . . [¶] I'm looking for some act in furtherance of a conspiracy." The court reasoned that Stammen's evidence, to the effect that Holman had expressed to Johnson his desire to "fuck that company up," and then immediately asked him "is there something that you can do to get into their website?," established only that Holman might have "planted the seed." In the court's view, that was insufficient to impose conspiracy liability.

The court then granted summary judgment to EZ Copy and Holman.

I

A defendant is entitled to summary judgment if it demonstrates that plaintiff "has not established, and cannot reasonably expect to establish, a prima facie case . . . ." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) However, "[i]n performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107), liberally construing [its] evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor." (*Saelzler v. Advanced Group 400, supra,* 25 Cal.4th at p. 768.)

Our duty to resolve evidentiary doubts in favor of plaintiff, J & H, includes the duty to indulge all inferences, reasonably deducible from the evidence, in its favor. "In ruling on the motion, the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom, . . . in the light most favorable to the opposing party. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 843.) A reasonable

inference "must be a reasonable conclusion from the evidence and cannot be based upon suspicion, imagination, speculation, surmise, conjecture or guesswork." (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1204.)

II

In this case, J & H argues the evidence it submitted, including the evidence that Holman – President of EZ Copy, asked Johnson directly if he could "get into" J & H's website – followed shortly thereafter by Johnson doing that very thing – is sufficient to support the conclusion that Johnson's act was the product of a conspiracy with these defendants. We agree.

"The gravamen of a cause of action for civil conspiracy consists of '"(1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts." [Citations.]' (*Mayes v. Sturdy Northern Sales, Inc*. (1979) 91 Cal.App.3d 69, 77.) As to the first element, 'a plaintiff is entitled to damages from those defendants who concurred in the tortious scheme with knowledge of its unlawful purpose. [Citation.] Furthermore, the requisite concurrence and knowledge '"'may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances."'" [Citation.] Tacit consent as well as express approval will suffice to hold a person liable as a coconspirator. [Citation.]' (*Wyatt v. Union Mortgage Co*. (1979) 24 Cal.3d 773, 784-785.)" (*Ahrens v. Superior Court* (1988) 197 Cal.App.3d 1134, 1150.)

While it is true that proof of a conspiracy requires evidence of a "wrongful act or acts" done in furtherance of the conspiracy, there is no requirement that each conspirator must have personally performed such an act. As explained in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd*. (1994) 7 Cal.4th 503, 511, '"'the major significance of the conspiracy lies in the fact that it renders each participant in the

wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, *irrespective of whether or not he was a direct actor and regardless of the degree of his activity*."' [Citations.]" (Italics added.)

In this case, of course, there is no dispute that the wrongful act occurred, nor is there any dispute that Johnson is the individual who directly committed that act. The only issue before us, then, is whether sufficient evidence was presented to support the inference that EZ Copy and Holman had at least tacitly consented to Johnson's act. Clearly, there was.

The evidence presented by J & H, which we must presume to be true for purposes of summary judgment, demonstrated that Holman and EZ Copy had a motive to harm J & H (which Johnson himself did not have – at least before he hooked up with them) and that Holman had specifically asked Johnson if he could "get into" the website. Perhaps most significant for our purposes, J & H also offered evidence that it was another employee of EZ Copy who contacted a mutual client of both EZ Copy and J & H, early in the morning after the hacking occurred, and informed it of the hacking – *before J & H itself was even aware it had occurred*.

That latter fact could mean either that EZ Copy constantly monitors J & H's website, or that it was somehow privy to the fact something unusual had occurred on that particular date. The latter would certainly be a reasonable inference, and strongly supports the conclusion that Holman and EZ Copy were in on the scheme from beginning to end. A jury might well conclude that EZ Copy was striking, to take advantage of the damage it had done to J & H, while the iron was hot.

This evidence, taken together, demonstrates that Holman's and EZ Copy's alleged role in the conspiracy is not the product of mere speculation. "'[S]peculation' simply means a guess, i.e., a conclusion not based upon a logical, reasonable, and therefore, lawfully drawable inference from the evidence. . . . Somewhere along the evidentiary spectrum, a rational inference loses its character if one or more of the

premises upon which it rests, fails. When this happens, the inference becomes irrational speculation." (*People v. Bohana* (2000) 84 Cal.App.4th 360, 369.) A mere possibility, without evidence, is insufficient to support an inference. (*Baker v. Gourley* (2000) 81 Cal.App.4th 1167; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108.)

In this case, the involvement of Holman and EZ Copy would be a "mere possibility" if all we knew was that Holman was hostile toward J & H, but had no evidence linking either him or EZ Copy to Johnson or the actual hacking incident. But here, such evidence is abundant. As the trial court itself put it, "the dots connect."

The judgment is reversed, and the case is remanded for further proceedings. J & H is to recover its costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.